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GERALD P. OSBORN, [illegible]
LEON W. [illegible]
[illegible]
Petitioners,

vs.

IVAN M. WEST, J. C. BURLAS, F. H. HARRISON, NATIONAL BANK OF TULSA, AND MASSACHUSETTS BONDING AND INSURANCE COMPANY, OF BOSTON, MASSACHUSETTS,
Respondents.

BRIEF OF RESPONDENTS, IVAN M. WEST AND MASSACHUSETTS BONDING AND INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, IN OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1948.

No. 714

GERALD F. UPDIKE, MRS. GRACE PEARL UPDIKE, LEON W. UPDIKE, AND JAMES M. UPDIKE, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF UPDIKE AWNING COMPANY,

Petitioners,

vs.

IVAN M. WEST, J. C. DUNLAP, P. N. NACHEFF, NATIONAL BANK OF TULSA, AND MASSACHUSETTS BONDING AND INSURANCE COMPANY, OF BOSTON, MASSACHUSETTS,

Respondents.

BRIEF OF RESPONDENTS, IVAN M. WEST AND MASSACHUSETTS BONDING AND INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, IN OPPOSITION TO PETITION FOR CERTIORARI.

The petition for certiorari filed herein apparently is intended to be based upon the four asserted grounds set out at pages 7 and 8 of the petition. We are unable to determine what portions of petitioners' argument apply to each of the stated grounds.

They contend, first:

"That the federal court has wrongfully assumed and exercised jurisdiction of a cause of action, of which

the District Court of Creek County, Oklahoma, had exclusive jurisdiction, in violation of the Constitution and laws of the United States, and the rights of petitioners thereunder; that thereby they have been deprived of property without due process of law."

In their following argument they say this:

"The cases cited by the Court of Appeals are adopted as correctly stating the law. Under these cases it was the clear duty of the Court of Appeals to reverse the decision of the trial court with directions to remand."

One may guess that they mean thereby to urge that there was no fraudulent joinder of the defendants. The District Court found as a fact that there was such fraudulent joinder and the Circuit Court of Appeals found the District Court was justified in so finding (R. 306), as shown in the following quotation from the Court of Appeals opinion:

"A separable controversy of the requisite amount, wholly between citizens of different states, may be removed to the federal court, notwithstanding the presence of a resident defendant, if it is shown that the resident defendant was made a party for the fraudulent purpose of defeating removal. *Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 92; *Pullman Co.* v. *Jenkins*, 305 U. S. 534; *Chesapeake & Ohio Ry. Co.* v. *Cockrell*, 232 U. S. 146. But fraudulent joinder, like any other allegation of fraud, must be pleaded with sufficient certainty to justify the conclusion that the joinder was a fraudulent device to prevent removal. A mere allegation of fraudulent joinder is not sufficient. *Kentucky* v. *Powers*, 201 U. S. 1, 34; *Wecker* v. *National Enameling Co.*, 204 U. S. 176; *Illinois Central R. R. Co.* v. *Sheegog*, 215 U. S. 308, 316; *Chesapeake & Ohio Ry. Co.* v. *Cockrell, supra; Wilson* v. *Republic Iron & Steel Co., supra.* The pleader is the architect of his own lawsuit,

and the misjoinder of parties or causes of action does not, without more, amount to a fraudulent joinder. There must be a deducible bad faith purpose to defeat federal jurisdiction. *Alabama Great Southern Ry.* v. *Thompson,* 200 U. S. 206; *Wecker* v. *National Enameling Co., supra; Illinois Central R. R. Co.* v. *Sheegog, supra; Chicago B. & Q. Ry. Co.* v. *Willard,* 200 U. S. 413; *Mecom* v. *Fitzsimmons,* 284 U. S. 183; *Pullman Co.* v. *Jenkins, supra.*

"Here, however, as the trial court pointed out, the petition for removal did not stop with a bare allegation of fraudulent joinder of separable causes of action. It attached the contracts sued upon to show that the cause of action against West was based upon one contract, while the cause of action against Dunlap and Nacheff was necessarily upon another contract subsequently executed, each of which imposed separate and distinct duties and obligations. The allegation that these contracts formed the basis for the lawsuit was not challenged in the motion to remand, and they must therefore be taken as true. At most, the motion to remand raised only the legal sufficiency of the factual allegations. From an examination of the pleadings, in the light of the attached contracts, the court concluded that the actions being on the contracts, and not in tort as contended by the appellees, the causes of action were not joint; that, assuming the allegations of fraudulent joinder to be true, there was a joinder of separate and distinct causes of action, for the fraudulent purpose of preventing removal of the case to the Federal court. In so holding, the trial court recognized the closeness of the question, and observed that ordinarily it would be inclined to resolve the doubt against jurisdiction, but under these peculiar circumstances, it was persuaded to resolve the doubt in favor of jurisdiction. We agree with the trial court that the petition for removal stated a case for fraudulent joinder, and the allegations being unchallenged, justified a conclusion accordingly."

In petitioner's brief, page 15, they say:

> "That there was in truth no fraudulent joinder of any of the parties—not even a misjoinder—is conclusively established by noting that the case was actually treated and tried as joint cause of action after removal."

The Circuit Court's opinion (R. 305), and even the petition for certiorari (p. 7), shows sufficiently that there was no trial of the case, but that it was dismissed because plaintiffs refused to offer evidence. And that it was never treated as a joint cause of action by anybody but the petitioners is sufficiently shown by the result.

Petitioners' second stated ground for certiorari is:

> "That the Circuit Court of Appeals for the Tenth Circuit has decided an important question of Federal law, the effect of which is to deny a right to amend motion to remand which has not been but should be settled by this court."

In support of that they quote the statutory rule providing liberal relief for defects of form in pleadings; and apparently they would have that rule construed to mean that the courts can exercise no discretion in putting any kind of limit upon the extent and number of amendments a litigant may demand—*ad infinitum*.

The Circuit Court's opinion indicates to some extent (R. 303), the great amount of patience shown and indulgence granted by the District Court to the plaintiffs, and the reason why, after all the court had opportunity to see, hear and learn about the parties and their claims during the two and a half years, he felt justified in refusing to permit further amendment. On page 19 of petitioners' brief they try to put the District Court in a false light with a

quotation from a portion of the record which includes an obvious misprint. It would show the court as saying:

> "'Under ordinary circumstances, I think I would permit leave to amend, particularly if the motion had been duly filed before a motion to remand was filed in this case'."

The meaningless word "filed" shown therein should be "overruled."

The court had in fact, at that time, twice previously overruled motions to remand and had indulged and permitted numerous other amended pleadings of plaintiffs.

In a similar case and under similar circumstances, the Circuit Court of Appeals, Sixth Circuit, in *Gibson* v. *C. & O. R. R. Co.*, 215 Fed. 24, said this:

> "'There must be somewhere a limit beyond which the court is not bound to extend indulgence in entertaining applications of this nature, especially where, as here, no special reason therefor is shown. It is the abuse of discretion, not its proper exercise, that can be reviewed. Such discretion cannot be said to be improperly exercised even if, looking backward, we should think that in the same circumstances we might have exercised discretion differently'."

And in the case of *Hunter* v. *Ill. Central Ry. Co.*, 188 Fed. 645, another case involving the same question, the court said this:

> "'We think that in denying the motion to plead, under the circumstances shown, the court did not abuse its discretion. The request to join issue upon the petition for removal was delayed upwards of five months after the denial of the motion to remand upon the face of the record, more than five months after the continuance of the case by consent to the next term of court and the joinder of issue upon the merits, and upon the

very eve of trial upon the merits. No excuse for the delay is suggested by the record. Assuming, without deciding, that the plaintiff should have been permitted, upon a seasonable motion, to plead to the petition for removal, notwithstanding the denial of the motion to remand upon the face of the record, such request to plead should have been seasonably made. We think it was not seasonably made when presented at the late date and under the circumstances above stated. In such case permission to join issue upon the facts contained in the removal petition was, at the most, addressed to the discretion of the court, and it does not appear that such discretion was not properly exercised in denying the motion'."

* * * * * * * *

"'Had it appeared on the trial of the case upon the merits that there was no separable controversy as to the removing defendants, it would have been the duty of the court to remand the cause. But such question does not arise upon this record'."

The last above quoted paragraph from said decision is specifically applicable here, in the light of the fact that petitioners caused the case to be dismissed in the District Court, because they refused to stand trial and offer evidence upon the merits, thereby adding materially to the presumption of fraudulent joinder as shown in the removal petition.

For their third stated ground, petitioners say:

"That said court has decided a federal question, viz., whether doubts are to be resolved in favor of rather than against federal jurisdiction in a way in conflict with applicable decisions of this court, and of other circuits."

They cite three cases which they claim support that contention. Their first reference is to *St. Louis Smelting & Refining Co.* v. *Nix,* 272 Fed. 977, which is a decision of

the same Circuit Court as in this case. We do not need to go beyond the paragraph from that opinion quoted by petitioners, and with which we fully agree. In this case the Court in no sense departed from the fundamental rule therein announced.

Next they quote from *Royalty Service Corp.* v. *City of Los Angeles,* 98 F. (2d) 551, as follows:

> " 'Jurisdiction of the federal courts depends on the situation as it exists at the time the suit is brought and subsequent events neither confer nor divest it'."

In the present case jurisdiction on the ground of fraudulent joinder of the other defendants with defendant West, a resident of Kansas, was determined as of the time of removal from the Creek County, Oklahoma, court. Petitioners themselves, elsewhere in their petition, try to claim that their subsequent amended petitions divested the court of jurisdiction. The only subsequent events that actually had any connection, indirectly, with the jurisdiction issue here was the eventual refusal of the court to allow plaintiffs to amend indefinitily.

The third quotation presented by petitioners on the proposition is from *Lehigh Mining & Mfg. Co.* v. *Kelly,* 160 U. S. 327, 337, 16 S. Ct. 307, 40 L. ed. 444, as follows:

> " 'The District Courts of the United States are courts of limited jurisdiction, and the presumption at every stage of a cause is that the cause is outside the jurisdiction of a court of the United States unless the contrary appears from the record'."

In the instant case the jurisdiction of the Federal Court did appear from the record, and the Court's very extended and careful consideration, and the conclusion and decision were based entirely upon the record. The above quoted rule has not herein been violated.

The fourth and last ground claimed by petitioners is:

> "That said court has sanctioned such a departure from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of this court's power of supervision."

May we say, without meaning to be facetious, that petitioners must have had in mind the "accepted and usual course of judicial proceedings" of their local Creek County court, where they had planned to keep Mr. West of Kansas to their advantage and his disadvantage.

We believe it may, at this point, be considered pertinent and permissible very briefly to submit a few facts from the record, particularly since the petition filed herein is rather cleverly designed to give one an impression that the petitioners are pure, innocent shorn lambs who have been pounced upon by the wolves. That purpose is made conspicuous in their summary statement near the beginning of their petition. With a similar obvious motive, the petition contains a complaint of the inexcusable size of the record, as if they were not responsible for it, including a substantial portion from the record of another case entitled "*United States of America* v. *Gerald Updike, et al.*, No. 1510-D" (R. 262-298).

Pursuing the same motive the petitioners have selected and quoted portions from observations made by the District Court from time to time during the various proceedings and hearings before that court, and in connection with which the court saw fit to give free expression to his trend of thinking, his doubts and his conclusions; all of which is merely evidence of the fact that the District Court was generally disposed to be very indulgent with the plaintiffs and gave them the utmost consideration and extension of time. Such excerpts from remarks by the court are necessarily misleading.

The respondent, Ivan M. West, was and is, without dispute, a resident of Wichita, Kansas, where he has a long established firm of certified public accountants, with no other place of business and no slightest indication of residence elsewhere.

During the late war he was called upon by the United States Army for service in checking war plants. In the early part of 1944, by arrangement and direction of Colonel Trask of the United States Army, he made a professional investigation of the records and financial condition of the Updike Awning Company's plant at Sapulpa, Oklahoma, then engaged in manufacturing war materials for the army. His report thereon to the army caused the army officers to require drastic changes in the management and operation of said plant, in order to protect the Government's investments therein. (R. 226-229) For a while there was an agreed arrangement under which West stayed at the plant and managed the fiscal affairs with Gerald Updike, one of the partners, managing the production. (R. 230) That was soon found unsatisfactory. West did not know, and was not expected to know, the production end of such a plant. The army officers, Colonel Trask and Major Bixby, arranged for the employment of Dunlap and Nacheff to superintend the production in the plant. West had not known Dunlap and Nacheff, and they had not known him. (R. 231) A written contract, prepared and promoted by an attorney for the Federal Reserve Bank of Kansas City as fiscal agent for the War Department, was entered into between West and the Updike partners, providing for his specific duties and compensation. (R. 15 and 229) Another contract prepared and promoted by the same attorney, was entered into between the Updikes and Dunlap and Nacheff, providing separate specific duties and compensation for them. (R. 23

and 229) The Updike partners then wrote a letter to the Federal Reserve Bank, as fiscal agent for the War Department, specifically approving both said contracts. (R. 25) Those contracts expired April 1st, 1945, and by agreement of the parties each was extended in operation for one month. (R. 265) During that month, April 1945, the United States of America instituted a suit in the United States District Court for the Northern District of Oklahoma entitled: "*United States of America* v. *Gerald Updike, et al.*, No. 1510-D," for the recovery of the balance then due the War Department and the National Bank of Tulsa from said defendants and asking for the appointment of a receiver. On April 20, 1945, the Federal Court appointed a receiver and he took charge of the business and affairs of the company. (R. 263-265) By direction of the receiver (R. 265) West continued his services, and in the receivership proceeding West filed claim for the balance due under his contract prior to the receivership, and separately for his services performed for the receiver, and the court upon hearing thereof, contested by petitioners herein and their counsel, made allowances to West for such services. (R. 297-298)

Shortly after the receiver was appointed, as aforesaid, and while West was in Creek County, Oklahoma, performing duties on behalf of the said receiver, petitioners commenced this lawsuit in the Creek County Court and caused summons to be served upon West in that county. (R. 6-9)

There would, of course, have been no doubt of West's right to remove such suit to the Federal Court if he had been the only defendant. But petitioners therein added as defendant with him, the National Bank of Tulsa, Oklahoma, obviously a resident of Oklahoma, and served summons on it in Tulsa County, and added Dunlap and Nacheff as defendants, and served summons on them in Kay County,

Oklahoma, where they were at that time operating a war production plant. (R. 6-9)

The petition as filed in said suit, in general and vague terms, asserted a claim in the amount of $75,000.00, against all four of said defendants, as being jointly responsible to the plaintiffs for breach of a contract in the management and operation of Updike Awning Company's business.

Respondent West, as a citizen of the State of Kansas, duly asserted his right to trial of the action in the Federal Court, by proper allegation thereof in a petition for removal. He asserted that the other three defendants had no kind of connection with his contractual relations with the plaintiffs, and he included in the removal petition a copy of his written contract with the plaintiffs, covering the only existing contractual relations between him and plaintiffs and constituting ample evidence of the fact that the other three defendants were not concerned with it or with any of his obligations to the plaintiffs, and constituting ample evidence of the fact that the plaintiffs did not have, and knew they did not have, any legal ground for joining the other defendants with the defendant West upon a pretended claim that they were jointly liable to the plaintiffs under a joint contract, and that plaintiffs had so framed their petition as filed in the state court for the fraudulent purpose of depriving West of his legal right to a trial in the Federal court (R. 13-14).

Petitioners herein apparently make the contention that the removal petition did not plead facts showing a fraudulent joinder, because the removal petition claimed that all four of the defendants were non-residents. (p. 5 of Pet. for Cert.) The removal petition did not claim, and it has never been claimed by anybody, that the defendant National Bank of Tulsa was not a legal resident of the State

of Oklahoma. The other defendants, Dunlap and Nacheff, claimed that when they were served with summons in Kay County, Oklahoma, they were only temporarily there operating a plant for the production of war material and that their long established principal place of business, the Langdon Tent & Awning Company (R. 165), was located in Kansas and that their actual residence was in Kansas; but they also definitely asserted in the removal petition that they had no legal connection with West or the bank and no joint liability with him and were joined with him and the bank in the suit for the fraudulent purpose of preventing removal.

The plaintiffs did not, in their motion to remand, nor in their alias motion to remand filed some two years after removal, deny that the separate contract of respondent West as attached to the petition for removal constituted the only contractual relation between him and them, and they did not deny that a separate written contract between plaintiffs and Dunlap and Nacheff, as attached to the removal petition, constituted the only contractual relation between those parties, and did not deny that there was no legal ground for claiming joint liability as between West and the other defendants, and did not deny fraudulent joinder as set out in the removal petition.

On the first motion to remand the court found that all of the defendants, except the bank, were residents of Kansas, but that there was separable controversy and that the court had jurisdiction of the action. The respondent herein, Massachusetts Bonding and Insurance Company of Boston, Massachusetts, was then, by the plaintiffs, added as a defendant in the case, upon the ground that it was jointly liable with defendant West because of being surety on his fidelity bond required by the War Department. (R.

42) After numerous hearings on pleadings and numerous amended pleadings filed by the plaintiffs and pre-trial hearings had been had and the case had been set for trial several times, and the plaintiff dismissed the case as to defendant bank, they filed a second or alias motion to remand, and the court then concluded, with an expression of serious doubt about the fact, that the defendant Nacheff had established legal residence in Oklahoma; but the court still held it had jurisdiction of the case, on the ground that there was, on the face of the record, actually a separable controversy as to defendant West and that there was no right to join the other defendants with him under a claim of joint liability and that they had been so joined for the fraudulent purpose of preventing removal to the Federal court.

The opinion of the Circuit Court of Appeals (R. 303-307) reflects the foregoing facts and findings of the court as based upon the record, and the Circuit Court applied well established rules of law to affirm the District Court's action.

It is now four years that this case has been pending. Respondents Ivan M. West and Massachusetts Bonding and Insurance Company respectfully urge that there is no proper ground for further review of the decisions of the two lower courts and that certiorari herein should be denied.

Respectfully submitted,

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